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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

BRAD R. JOHNSON,

Plaintiff

v.

FRANCHISE TAX BOARD, STATE OF CALIFORNIA,

BILL LOCKYER,

DENNIS L. STOUT,

COUNTY OF SAN BERNARDINO,
STATE OF CALIFORNIA,

Respondents

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Questions Presented for Review are categorized by court and nature of issue and are presented as follows.

In the Central District of California
Denied Opportunity to File Amended Complaint as well as Notice and an Opportunity to be Heard Before Submitting his Recommendation in a Sua Sponte Determination under Rule 12(b)(6)

1. Whether Magistrate Judge Andrew J. Wistrich in the Central District of California erred in denying consideration of Plaintiff's Affidavit [a prior submission duly filed, incorporated by reference into Plaintiff's First Amended Complaint and reflecting the factual basis of Plaintiff's claims] because it was not directly attached, while contemporaneously denying Plaintiff's motion to amend said Complaint as well as notice and an opportunity to be heard before submitting his recommendation?

In the Central District of Illinois
Transfer under Section 1406(a) from CD IL to CD CA

2. WHETHER the Ninth Circuit Court of Appeals erred in employing an "abuse of discretion" standard (rather than a De Novo standard) in reviewing the transfer of the instant case pursuant to 28 U.S.C. Section 1406(a) from the Central District of Illinois to the Central District of California?

3. WHETHER it was clear legal error under **28 U.S.C. Section 1391(b)(2)** [within the context of a *sua sponte transfer* under **28 U.S.C. Section 1406(a)**] for the Central District of Illinois to find that venue

was improper (i.e., that the District Court was not a judicial district either (i) within which a substantial part of the events or omissions giving rise to the claim occurred or (ii) within which a substantial part of property, the subject of the action, is situated)?

Pre-Judgment Child Support Procedures

4. Whether Judge Gary L. Taylor in the Central District of California and the Ninth Circuit Court of Appeals erred in dismissing Plaintiff's constitutional due process claims under Section 1983 for lack of jurisdiction because it cannot be determined at the pleading stage that, as a matter of law under the Rooker-Feldman Doctrine, the district court had no jurisdiction, where, under the facts of the instant case, the judgment was a default judgment for which plaintiff had no notice or opportunity to be heard?

Post-Judgment, Pre-deprivation, Child Support Enforcement Procedures

5. Whether Judge Gary L. Taylor and the Ninth Circuit Court of Appeals erred in dismissing Plaintiff's constitutional procedural due process claims under Section 1983, where, under the facts of the instant case, a child support obligation was established by default judgment without notice or opportunity to be heard, because it cannot be determined at the pleading stage, as a matter of law, that the post-judgment, pre-deprivation procedures actually employed to enforce such child support obligation did, in fact, satisfy U.S. constitutional procedural due process requirements?

6. Whether adherence to the requirement of Cal Rev & Tax Code § 19271(a)(3) ["At least 20 days prior to the date that the Franchise Tax Board commences collection action under this article, the Franchise Tax Board shall mail notice of the amount due to the obligated parent at the last known address and advise the obligated parent that failure to pay will result in collection action. If the obligated parent disagrees with the amount due, the obligated parent shall be instructed to contact the local child support agency to resolve the disagreement."] is a procedural due process requirement in the instant case?

7. Does *Griffins* limit *Endicott*'s holding that notice and hearing on the underlying judgment serves as constructive notice of all that will follow?

Absolute Prosecutorial Immunity

8. Whether Judge Gary L. Taylor erred in holding that Stout is entitled to Absolute Prosecutorial Immunity because it cannot be determined at the pleading stage, as a matter of law, that Stout enjoys Absolute Prosecutorial Immunity from plaintiff's Section 1983 claims for money damages since, under the facts of the instant case, intentionally failing to (i) diligently determine Plaintiff's last known address and (2) attest to proper notice are non-advocatory, administrative functions?

STATEMENT OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Seventh Circuit.

CORPORATE DISCLOSURE STATEMENT

There is no parent or subsidiary company to be listed, as there exists no party who is a corporation.

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OPINIONS BELOW

United States Court of Appeals for the Ninth Circuit

1. The Memorandum of the United States Court of Appeals for the Ninth Circuit filed on April 21, 2003 affirming the holdings of the United States District Court for the Central District of California, whose affirming judgment is here sought to be reviewed, is unreported and is printed in Appendix A, page A-37.

2. The Order of the United States Court of Appeals for the Ninth Circuit filed July 1, 2003 denying Plaintiff-Appellant's *Petition for Rehearing* is unreported and is printed in Appendix A, page A-40.

United States District Court for the Central District of Illinois, Danville/Urbana Division

3. The Report and Recommendation of United States Magistrate Judge, David G. Bernthal, filed August 28, 2001 is unreported and is printed in Appendix A, page A-5.

4. The District Court's Order filed September 19, 2001 approving the Report and Recommendation of United States Magistrate Judge is unreported and is printed in Appendix A, page A-11.

5. The District Court's Order filed October 30, 2001 granting Plaintiff's motion for reconsideration is unreported and is printed in Appendix A, page A-17.

United States District Court for the Central District of California, Eastern Division

6. The Report and Recommendation of United States Magistrate Judge, Andrew J. Wistrich, filed May 22, 2002 is unreported and is printed in Appendix A, page A-20.

7. The District Court's Order filed August 2, 2002 approving the Report and Recommendation of United States Magistrate Judge is unreported and is printed in Appendix A, page A-36.

STATEMENT OF JURISDICTION

The Memorandum of the United States Court of Appeals for the Ninth Circuit (Appendix A, page A-37), affirming the holdings of the United States District Court for the Central District of California, was filed on April 21, 2003. A timely petition for rehearing was denied on July 1, 2003 (Appendix A, page A-40).

The jurisdiction of the Court is invoked under U.S. Const. Art. III and 28 U.S.C. Section 1254 on review of a final judgment of a United States Court of Appeals.

STATEMENT OF THE CASE

Description

This case can be described as a civil rights claim for money damages (actual and punitive) and injunctive and declaratory relief under the United States Constitution, particularly pursuant to the provisions of the Fourteenth Amendment to the Constitution of the United States, and under federal law, particularly pursuant to Title 42 of the United States Code, Section 1983 and Title 28 of the United States Code, Sections 2201 and 2202 for the purpose of

enjoining said Defendants-Respondents from enforcing Sections 19271 of the California Revenue and Taxation Code on the basis that the conduct, policies and practices of Defendants-Respondents (as identified in the Affidavits of Plaintiff and Viki Hollander printed in Appendix A, pages A-41 & 57, respectively) have violated (1) Federal Child Support Enforcement Provisions (Appendix A, pages A-67 to A-75), (2) California Child Support Enforcement Plan Provisions (Appendix A, pages A-76 to A-92), and (3) Plaintiff-Appellant's U.S. Constitutional Guarantee of Procedural Fairness flowing from the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution [*Plaintiff's First Amended Complaint*], where Plaintiff-Petitioner's prayer for relief sought a "preliminary and permanent injunction enjoining defendants (Stout and Lockyer) and employees/agents/officers of defendants (Franchise Tax Board, Attorney General's Office, San Bernardino, and District Attorney's Office), their agents, employees, and those acting in concert with them, from enforcing Sections 19271 of the California Revenue and Taxation Code and collecting on any amount of child support arising from a 1986 Multnomah County, State of Oregon child support order in which Plaintiff-Petitioner is the obligor and Viki S. Hollander is the obligee." [*Plaintiff's First Amended Complaint*]. Jurisdiction in the United States District Court is based on federal question pursuant to 28 U.S.C. Section 1343.

In the instant case, it is alleged that public officials of the State of California and the County of San Bernardino have intentionally, wantonly, and with malice of forethought unjustly exceeded their authority and power in their unlawful and unconstitutional efforts to collect nonexistent amounts of "delinquent child support obligation" for the purpose of obtaining increased federal incentive grant dollars for their child support enforcement efforts. Here, in a nutshell, employees of San Bernardino County, Child Support Enforcement and the State of California intentionally used the judicial system and the

long and powerful arm of the State of California (through the Franchise Tax Board) to intentionally victimize Plaintiff-Appellant by taking the property of Plaintiff, a resident of the State of Illinois, without due process of law guaranteed to him by the Fourteenth Amendment to the Constitution of the United States, where the motivation for such acts was the resultant federal incentive grant subsidies received by the County of San Bernardino and the State of California for their child support enforcement efforts. **This case dramatically (and tragically) demonstrates how legitimate national policy concerns for child support enforcement, resulting in federal incentive grant subsidies for state and county child support enforcement efforts, have led to child support enforcement efforts that violate an obligor's due process under the Fourteenth Amendment to the Constitution of the United States.**

Facts*

*** From the Affidavits of Plaintiff and Viki Hollander printed in Appendix A, pages A-41 & 57, respectively**

About December 1999, employees of San Bernardino County (Office of the District Attorney), State of California [including Defendant Stout] in a San Bernardino County Court "IV-D Case" registered a foreign 1986 Multnomah County, State of Oregon Child Support Order, for which Viki S. Hollander was the obligee and Plaintiff was the obligor. This act was known by such employees of San Bernardino County (Office of the District Attorney), State of California [including Defendant Stout]:

a. to have been accomplished without the notice, authorization, approval, permission, or acquiescence of either the obligor (Plaintiff) [Affidavit of Plaintiff, A-41] or obligee (Viki S. Hollander) [Affidavit of Viki S. Hollander, A-57], which resulted in a default judgment against Plaintiff and
b. to have exceeded the authority and power of such employees of San Bernardino County (Office of the

District Attorney), since in "IV-D Cases" the District Attorney does not represent the interests of either party and Viki Hollander had neither requested nor authorized such action [Affidavit of Viki S. Hollander, A-57].

Since December 1999, Plaintiff has been a target and victim of Defendants' unconstitutional, criminal and tortious schemes and artifices to defraud Plaintiff of his property, described as follows.

1. **On July 7, 2000,** *without any actual or constructive notice to Plaintiff,* the State of California, Franchise Tax Board, Child Support Collections issued an ORDER TO WITHHOLD (any credits or payments owing to Brad R. Johnson) under authorization of Sections 19271 and 18670 of the California Revenue and Taxation Code to U.S. Bank, Attn: Attachments & Garnishments, P.O. Box 14129, Portland, OR 97214, to enforce payment of a DELINQUENT FAMILY SUPPORT DEBT in the amount of $1,250 of DEBTOR, Brad R. Johnson. This ORDER TO WITHHOLD was forwarded to Plaintiff in Kankakee, Illinois by U.S. Bank and received by Plaintiff on July 15, 2000. It is important to note that the ORDER TO WITHHOLD had a Milledgeville, Georgia address, which was 7 years old. [Affidavit of Plaintiff, A-41].
2. **On July 17, 2000,** Brad R. Johnson informed employees of San Bernardino County (Office of the District Attorney, Child Support Enforcement) and employees of the Franchise Tax Board, Child Support Collections by telephonic communication that in fact no delinquent child support amount existed (or ever existed) and that they had made a terrible mistake. **Further, Plaintiff informed employees of San Bernardino County (Office of the District Attorney, Child Support Enforcement) of his current address in Kankakee, Illinois.** These employees told Plaintiff that Plaintiff would need to prove to them (in the form of cancelled

checks) that he had paid his child support. [Affidavit of Plaintiff, A-41].

3. **On July 28, 2000,** Viki S. Hollander informed Employees of San Bernardino County (Office of the District Attorney, Child Support Enforcement) by E-mail and telephonic communication that no delinquent child support amount existed (or ever existed) and that they had made a terrible mistake. [Affidavit of Viki S. Hollander, A-57].
4. **On July 31, 2000,** Plaintiff sent a Demand Letter dated July 30, 2000 to (i) the Franchise Tax Board, Child Support Collections by FedEx Priority Overnight (5574782625) and (ii) the San Bernardino District Attorney's Office - Child Support Enforcement by FedEx Priority Overnight on July 31, 2000 (5574782636) as a result of their joint violation of Plaintiff's civil rights under the Fourteenth Amendment to the Constitution of the United States. **Plaintiff included his current address in the Demand Letters.** [Affidavit of Plaintiff, A-41].
5. **On May 8, 2001,** *without any actual or constructive notice to Plaintiff,* the State of California, Franchise Tax Board, Child Support Collections issued another ORDER TO WITHHOLD (any credits or payments owing to Brad R. Johnson) under authorization of Sections 19271 and 18670 of the California Revenue and Taxation Code to U.S. Bank, Attn: Attachments & Garnishments, P.O. Box 14129, Portland, OR 97214, to enforce payment of a DELINQUENT FAMILY SUPPORT DEBT in the amount of $4,225 of DEBTOR, Brad R. Johnson. This ORDER TO WITHHOLD was forwarded to Plaintiff in Kankakee, Illinois by U.S. Bank and received by Plaintiff on May 21, 2001. It is important to note that the ORDER TO WITHHOLD had a Milledgeville, Georgia address, which was 7 years old. Purposefully, neither the employees of San Bernardino County (Office of the District Attorney, Child Support Enforcement) nor employees of the Franchise Tax

Board, Child Support Collections updated their records to include Plaintiff's current address. [Affidavit of Plaintiff, A-41]. Clearly, any required due process notice was not sent to Plaintiff's last known address and accordingly Defendants' have **intentionally, wantonly, and with malice of forethought** violated Plaintiff's due process guarantee under the Fourteenth Amendment to the U.S. Constitution.

6. **On June 13, 2001,** Plaintiff filed a 1983 action against certain public officials of the State of California in their individual capacities and the County of San Bernardino.

The Rulings Below

The District Court

On August 28, 2001, with a view toward transferring the instant case no matter what the cost, United States Magistrate Judge, David G. Bernthal, filed his *Report and Recommendation* (hereinafter referred to as the *Report*), A-5. The *Report* falsely stated that Defendants moved the District Court "to transfer the proceedings to the United States District Court for the Central District of California **pursuant to 28 U.S.C. Section 1404 because all Defendants reside in California and a substantial part of the events occurred there."** In fact, Defendants moved the District Court to transfer the proceedings to the United States District Court for the Central District of California **pursuant to 28 U.S.C. Section 1406(a) because it is the district in which all of the defendants reside or do business pursuant to 28 U.S.C. Section 1391(a).** The *Report* concludes by granting the *Motion for Change of Venue* under *28 U.S.C. Section 1404 [not U.S.C. Section 1406(a)]*, where the *Report* found venue controlled by *28 U.S.C. Section 1391(b) [not by 28 U.S.C. Section 1391(a)]*.

As permitted by Fed.R.Civ.P. 72(b), on September 17, 2001, Plaintiff filed *Plaintiff's Objection to the Report and*

Recommendation of the United States Magistrate Judge, David G. Bernthal and Motion to Reconsider.

On September 19, 2001, the District Court entered an unpublished *Order* [hereinafter referred to as the *District Court's September 19th Order*, A-5, wherein "[a]fter a thorough and careful de novo review," the District Court:

1. GRANTED Defendants' *Motion for Change of Venue* and ordered the instant case transferred to the Central District of California pursuant to 28 U.S.C. Section 1406(a), where the District Court identified 28 U.S.C. Section 1391(b) as controlling venue and specifically found:
   a. "Plaintiff is correct that Defendants did not ask this court to transfer venue pursuant to 28 U.S.C. Section 1404(a)."
   b. "Defendants incorrectly argued that Plaintiff based 'the venue of the present action in large part upon the court's diversity jurisdiction [28 U.S.C. Section 1391(b)].'"
2. DENIED *Plaintiff's Motion to File Amended Complaint*, where the District Court specifically found "that it is unlikely that Plaintiff left out of his Complaint any material events giving rise to the claim that would connect this claim to the Central District of Illinois."

On September 19, 2001, Plaintiff filed *Plaintiff's First Amended Complaint.*

On October 2, 2001, Plaintiff filed a motion for reconsideration of the *District Court's September 19th Order*, raising the following four objections to the District Court's application of law.

1. A CLEAR LEGAL ERROR: No Opportunity to be Heard. On the issue of the District Court's transfer for improper venue arising from the tandem application of 28 U.S.C. Section 1406(a) and 28 U.S.C. Section 1391(b).
2. A CLEAR LEGAL ERROR: No Opportunity to be Heard. On the issue of whether *Plaintiff's First Amended Complaint* provided for proper venue in the District Court.

3. MISAPPLICATION OF VENUE LAW: 28 U.S.C. Section 1391(b)(2). On the issue of the District Court's interpretation of "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred."
4. MISAPPLICATION OF VENUE LAW: 28 U.S.C. Section 1391(b)(2). On the issue of the District Court's interpretation of "a substantial part of property that is the subject of the action is situated."

On October 30, 2001, the District Court filed an unpublished *Order* [hereinafter referred to as the *District Court's October 30th Order*, A-17, wherein the District Court found that Plaintiff "had the right to amend his 'pleading once as a matter of course at any time before a responsive pleading is served'" under Fed.R.Civ.P. 15(a). Accordingly, "Plaintiff should have been allowed to file an amended complaint." **However, the District Court did not allow Plaintiff an opportunity to be heard on *Plaintiff's First Amended Complaint* with respect to the issue of improper venue and a resulting transfer pursuant to 28 U.S.C. Section 1406(a), where venue is controlled by 28 U.S.C. Section 1391(b)(2).** Instead, the District Court summarily rejected venue as being proper in the District Court by stating that the District Court has "carefully considered all of the allegations included in *Plaintiff's First Amended Complaint*," where such complaint "does not add any allegations that any of 'the events or omissions giving rise to the claim occurred' in this district. See 28 U.S.C. Section 1391(b)(2). This court specifically notes that Plaintiff does not allege that any of Defendants' actions took place in Illinois. **There are no allegations that Defendants sent anything to him in Illinois** or made any telephone calls to him in Illinois. Accordingly, this court again concludes that venue is not proper in this district." IT IS THEREFORE ORDERED THAT . . . (2) *Plaintiff's Motion for Reconsideration* (#18) is DENIED as to Plaintiff's request that this court reconsider its *Order* that granted *Defendant's Motion for Change of Venue* (#4). This case is

transferred to the Central District of California pursuant to 28 U.S.C. Section 1406(a)."

On November 26, 2001, Plaintiff-Appellant filed an appeal to the United States Court of Appeals for the Seventh Circuit from the *District Court's October 30th Order.*

Plaintiff contended that the Seventh Circuit had the following two independent and alternative bases upon which to assert jurisdiction [Plaintiff-Appellant's Petition for Rehearing] and review the *District Court's October 30th Order* granting *Defendants' Motion for Change of Venue* and a plenary transfer of the case under Section 1406(a).

1. Such order has the practical effect of denying Plaintiff's prayer for temporary and injunctive relief and therefore such order was immediately appealable under 28 U.S.C. Section 1292(a)(1) and Carson v. American Brands, Inc., 450 U.S. 79, 83-84, 101 S. Ct. 993, 67 L. Ed. 2d 59 (1981).
2. Under the collateral order doctrine of Cohen v Beneficial Industrial Loan Corp., 337 U.S. 541, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949), such order is treated as final under 28 U.S.C. Section 1291 because such order (i) deals with a serious and unsettled question and (ii) has the required characteristics of being separable, final and unreviewable.

The Seventh Circuit completely ignored these bases for jurisdiction and on February 4, 2002 entered an unpublished order dismissing the appeal for lack of jurisdiction, as follows.

> "An order transferring a case to another federal district court is not immediately appealable. See *In re Joint Eastern & Southern Districts Asbestos Litigation*, 22 F. 3d 755, 762 n. 14 (7th Cir. 1994); *Graphics Communications Union v. Chicago Tribune Co.*, 779 F.2d 13, 15 (7th Cir. 1985).

However, both cited cases [*In re Joint Eastern & Southern Districts Asbestos Litigation* and *Graphics Communications Union*], dealt with a transfer order under Section 1404(a) [a transfer for convenience, essentially a change in courtroom

location]. In stark contrast, the instant case deals with a transfer order under Section 1406(a) [a transfer because of improper venue, with definite and substantive legal effects].

Plaintiff filed a *Petition for Rehearing* on February 19, 2002, which was denied in an unpublished Order of the United States Court of Appeals for the Seventh Circuit entered on April 2, 2002. Mandate issued on April 3, 2002.

Because Plaintiff wanted to file a *Petition for Writ of Mandamus*, but was prevented from doing so because the Court's mandate had issued, on April 9, 2002 Plaintiff filed a *Motion to Recall the Mandate and to Stay the Proceedings to Allow Time for Plaintiff to file his Petition for Writ of Mandamus*. On April 24, 2002 the Seventh Circuit entered an unpublished order denying Plaintiff's Motion to Recall the Mandate.

On May 1, 2002 Plaintiff filed a *Motion to Recall the Mandate and to Stay the Proceedings to Allow Time for Plaintiff to file his Petition for Writ of Certiorari*. On May 2, 2002, the Seventh Circuit entered an unpublished order denying Plaintiff's Motion to Stay the Mandate.

On July 1, 2002, Plaintiff filed a Petition for Writ of Certiorari appealing the order of Illinois District Court transferring the case to the Central District of California under Section 1406(a) because venue in Illinois was improper, on the basis that such order was final, since Plaintiff contended that the Ninth Circuit Court of Appeals would not review, de novo, the decision of the Illinois District Court as to whether venue was proper in Illinois. On February 24, 2003, this Court denied cert.

On May 22, 2002, a REPORT AND RECOMMENDATION (hereinafter referred to as the R & R), A-20, issued by Magistrate Judge Andrew J. Wistrich was filed. Magistrate Judge Wistrich recommended dismissal pursuant to FRCP 12(b)(6), in the absence of a motion under FRCP 12(b)(6), where Plaintiff had no notice or opportunity to be heard prior to Magistrate Judge Wistrich's R & R. In the absence of a motion under FRCP

12(b)(6), where Plaintiff did not receive the R & R until after the time to respond, Plaintiff had no opportunity to properly respond to the issues that the Magistrate Judge raised in the R & R.

On August 2, 2002, an ORDER (A-36) by Judge Gary L. Taylor adopting the R&R and dismissing the case with prejudice was filed.

Plaintiff appealed to the Ninth Circuit Court of Appeals. On April 21, 2001, the Ninth Circuit filed a Memorandum affirming the ORDER and JUDGMENT of the California District Court.

REASONS FOR GRANTING THE WRIT

Dr. Brad R. Johnson, the Plaintiff-Appellant-Petitioner, prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Ninth Circuit filed in this case on April 21, 2003, affirming the holdings of the U.S. District Court for the Central District of California. This order should be reviewed by this honorable Court because of the compelling reasons that follow from the Questions Presented, as described below.

To Settle Important Questions of Practice under the Federal Rules of Civil Procedure
and
Rendered Decision of the United States District Court for the Central District of California that has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of the Supreme Court's Power of Supervision

Denied Opportunity to File Amended Complaint as well as Notice and an Opportunity to be Heard in a Sua Sponte Determination under Rule 12(b)(6)

1. Whether Magistrate Judge Andrew J. Wistrich in the Central District of California erred in denying consideration of Plaintiff's Affidavit [a prior submission duly filed, incorporated by reference into *Plaintiff's First Amended Complaint* [FAC] and reflecting the factual basis of Plaintiff's claims] because it was not directly attached, **while contemporaneously denying Plaintiff's motion to amend the Complaint as well as notice and an opportunity to be heard before submitting his recommendation?**

Discussion (Issue 1)

In the first instance, when deciding a motion to dismiss, a court may consider the complaint and "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." *Branch v. Tunnell,* 14 F.3d 449, 454 (9th Cir.), *cert. denied,* 129 L. Ed. 2d 832, 114 S. Ct. 2704 (1994). Accordingly, Judge Gary L. Taylor erred when he did not consider Plaintiff's Affidavit incorporated by reference into Plaintiff's FAC, even though not directly attached. As is shown below, Plaintiff's Affidavit presents facts that provide the basis upon which Plaintiff's claims can be granted.

But further, "in a line of cases stretching back nearly 50 years, we have held that in dismissing for failure to state a claim under Rule 12(b)(6), "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Doe v. United States,* 58 F.3d 494, 497 (9th Cir. 1995); *see also Cook, Perkiss & Liehe, Inc. v. Northern Cal. Collection Serv., Inc.,* 911 F.2d 242 (9th Cir. 1990); *Balistreri v. Pacifica Police Dep't,* 901 F.2d 696 (9th Cir. 1990); *Noll v. Carlson,* 809 F.2d 1446 (9th Cir. 1987); *Bonanno v. Thomas,* 309 F.2d

320 (9th Cir. 1962); *Sidebotham v. Robison*, 216 F.2d 816 (9th Cir. 1954).

This amendment policy is informed by Federal Rule of Civil Procedure 15(a), which provides that leave to amend should be freely granted "when justice so requires." Although Rule 15(a) gives the trial court discretion over this matter, courts have repeatedly stressed that the court must remain guided by "the underlying purpose of Rule 15 . . . to facilitate decision on the merits, rather than on the pleadings or technicalities." *Noll*, 809 F.2d at 1448. In addition, the Supreme Court has stated that "this mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962). To that end, "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Doe*, 58 F.3d at 497.

Accordingly, the district court's action was also inconsistent with Ninth Circuit precedent because Plaintiff is a pro se plaintiff. The Ninth Circuit has noted frequently that the "rule favoring liberality in amendments to pleadings is particularly important for the pro se litigant. Presumably unskilled in the law, the pro se litigant is far more prone to making errors in pleading than the person who benefits from the representation of counsel." *Noll*, 809 F.2d at 1448. Under *Noll*, the requirement that courts provide a pro se litigant with notice of the deficiencies in his or her complaint helps ensure that the pro se litigant can use the opportunity to amend effectively. Without the benefit of a statement of deficiencies, the pro se litigant will likely repeat previous errors. This is equally true for the pro se litigant who amends his complaint at his own instance without any guidance from the court. Amendments that are made without an understanding of underlying deficiencies are rarely sufficient to cure inadequate pleadings. Accordingly, on this basis alone, the district court erred in dismissing the instant case for failure to state a claim.

Under the Fifth Amendment to the U.S. Constitution, Plaintiff is guaranteed notice and an opportunity to be heard as well as access to the courts. Magistrate Judge Wistrich's conduct in issuing his R & R has violated Plaintiff's guarantee of Due Process under the Fifth Amendment to the U.S. Constitution (1) by reporting and recommending dismissal for failure to state a claim pursuant to FRCP 12(b)(6) without notice and opportunity to be heard, where no motion to dismiss was, in fact, pending, thereby denying Plaintiff access to the district court.

Accordingly, this honorable Court should grant Petitioner's Writ of Certiorari in furtherance of justice to correct excesses because it was clear legal error under Fed.R.Civ.P. 15(a) and the Due Process Clause of the Fifth Amendment of the U.S. Constitution for the United States District Court for the Central District of California to deny Plaintiff an opportunity to be heard on Plaintiff's First Amended Complaint with respect to sua sponte motion to dismiss under Rule 12(b)(6).

Moreover, it is important to note that in the instant case, the Ninth Circuit went against its own precedent. This case would represent an inconsistency under Ninth Circuit precedent were it not for the fact the Ninth Circuit designated its decision here as "Not for Publication." Plaintiff contends that the Ninth Circuit avoids making bad "law" from bad decisions in this manner. It is only this Court that can control such acts of manipulation. Plaintiff requests that this Court take these steps to stop this kind of abuse that may corrupt our legal system.

Rendered Decision of the United States Court of Appeals for the Ninth Circuit has Decided an Important Question of Federal Law in a way that Conflicts with Relevant Decisions of the Supreme Court

In the Central District of Illinois
Transfer under Section 1406(a) from CD IL to CD CA

2. WHETHER the Ninth Circuit Court of Appeals erred in employing an "abuse of discretion" standard (rather than a De Novo standard) in reviewing the transfer of the instant case pursuant to 28 U.S.C. Section 1406(a) from the Central District of Illinois to the Central District of California?

3. WHETHER it was clear legal error under **28 U.S.C. Section 1391(b)(2)** [within the context of a *sua sponte transfer* under **28 U.S.C. Section 1406(a)**] for the Central District of Illinois to find that venue was improper (i.e., that the District Court was not a judicial district either (i) within which a substantial part of the events or omissions giving rise to the claim occurred or (ii) within which a substantial part of property, the subject of the action, is situated)?

Discussion (Issues 2-3)

In the instant case, the United States District Court for the Central District of Illinois found venue improper. However, this District Court applied an incorrect and obsolete standard in determining that venue was improper under 28 U.S.C. Section 1391(b)(2). Under the 1990 Amendment to 28 U.S.C. Section 1391(b)(2), district courts

should no longer ask which district among the two or more potential forums is the best venue. Rather, they should ask whether the district that the plaintiff chose had a substantial connection to the claim, whether or not other forums had greater contacts. *Bates v. C & S Adjusters, Inc.*, 980 F. 2d 865, 866-68 (2d Cir. 1992) (noting that "the new statute does not, as a general matter, require the District Court to determine the best venue").

The statutory standard of the current venue statute focuses *not* on whether a defendant has made a deliberate contact--a factor relevant in the analysis of personal jurisdiction--but on the location where events occurred. Under the new version of 28 U.S.C. Section 1391(b)(2), a court must determine only whether a substantial part of the events giving rise to the claim occurred in Plaintiff's chosen forum. In cases where a plaintiff is alleging violations under the FDCPA, courts have found venue to lie based on a single act directed by the defendant/creditor to plaintiff's state of residence. See *Bates v. C&S Adjusters, Inc.*, 980 F. 2d 865, 868 (2nd. Cir. 1992) (a collection letter forwarded to Plaintiff's new state of residence sufficient for venue in that state). Accordingly, *Bates* is direct authority for the proposition that venue is proper in the instant case.

In *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F. 3d 135, 153 (2d Cir. 2001) (quoting this conclusion from *Bates*), many of Zhen Hua's communications reached Titan's offices in New York through the Connecticut brokers. However, this did not alter the fact that Zhen Hua directed communications to New York. Accordingly, venue in the Southern District of New York was proper. Also see *Bailey v. Clegg, Brush and Assoc., Inc.*, 1991 U.S. Dist. LEXIS 21591, No 1:90- CV-2702-CAM, 1991 WL 143461, at *2 (N.D.Ga. June 14, 1991); *Murphy v. Allen County Claims & Adjustments*, 550 F. Supp. 128, 130-31 (S.D. Ohio 1982). See also *Vlasak v. Rapid Collection Systems, Inc.*, 962 F. Supp. 1096, 1102 (7th Cir. 1997) ("When an individual receives calls or letters from a distant collection agency -- and when those calls or letters

are allegedly illegal under the FDCPA -- it makes sense to permit the individual to file suit where he receives the communications."). Thus, it is nonsensical to permit defendant-debt collectors to engage in practices that may violate the FDCPA and harass persons in other districts, and then force such persons to come to the defendants' district to bring action against them, where the activities that transpired in the district were not insubstantial in relation to the totality of events giving rise to the plaintiff's grievance. Again, here, these cases provide direct authority for the proposition that venue is proper in the instant case.

In *U.S. v Hartbrodt*, 773 F. Supp. 1240 (SD Iowa 1991), the government alleged that Hartbrodt had been engaging in a scheme to defraud. When Hartbrodt moved to transfer venue, asserting that venue was improper in the district under 28 U.S.C. Section 1391(b), Hartbrodt argued that the events occurring in Iowa were not "substantial." In deciding whether or not events were substantial, the court first determined what events gave rise to the government's claim, alleging violations of the mail fraud statute, 18 U.S.C. Section 1341, and the wire fraud statute, 18 U.S.C. Section 1343. Therefore, in *Hartbrodt*, even one act involving the use of the mails or the telephone supported the government's claim for an injunction, assuming it was part of a scheme or artifice to defraud.

In *Stroman Reality, Inc. v. Antt Jr., et al.*, 20 F. Supp. 2d 1050 (DC Tex 1998), defendants used Texas law and the Texas government in their deliberate efforts to regulate Stroman. Defendants argued that a substantial part of events giving rise to the claim--the enforcement of their regulations--occurred in their states. The court disagreed. It stated that Stroman complained of what the defendants had done in Texas: trying to regulate his business in Texas with non-Californians and non-Floridians that happen to involve property in the defendants' states. Because the contested regulation included invoking Texas government to regulate Stroman, the court determined that venue was wholly proper in Texas.

Again, here, these cases provide direct authority for the proposition that venue is proper in the instant case. In the present action, since deprivation, damage, and harm are necessary elements of the legal theories invoked, claims of violations of constitutional guarantees under the Fifth and Fourteenth Amendments of the U.S. Constitution arise where the locus criminis or the locus in quo of such deprivation, damage, and/or harm occurs. In the present action, that place is Kankakee County, State of Illinois, the situs of the bank account from which Plaintiff's monies were taken.

"[T]he **situs** of personal property follows the domicile of the owner.This was the common law rule, and its principles have been recognized by many decisions of this court. (*In re Appeal of Borden,* 208 Ill. 369; *Ellis* v. *People,* 199 id. 548; *Mills* v. *Thornton,* 26 id. 300; *Illinois Central Railroad Co.* v. *Carr,* 302 id. 172; *People* v. *Culver,* 304 id. 566.) Thus, it was said in *Illinois Central Railroad Co.* v. *Carr, supra:* 'As a general rule, incorporeal personal property has no locality but accompanies the person of the owner wherever he goes. But that is merely a rule of the common law adopted for convenience, only, and it may be changed by the legislature in the exercise of its judgment. The actual ***situs*** of personal property having a visible and tangible existence will determine the town or district in which it may be taxed without reference to the domicile of the owner, but **intangible property** for the purpose of taxation, in the absence of a statute, is generally held to be situated at such domicile.' This rule has won unqualified acceptance when applied to the taxation of intangibles. *Blodgett* v. *Silberman,* 277 U.S. 1, 9, 10; *Baldwin* v. *Missouri,* 281 id. 586." Wheelock v. Gill, 366 Ill. 378 (1937).

Thus, venue is proper in the District Court for the Central District of Illinois under 28 U.S.C. Section 1391(b)(2).

In addition, Plaintiff-Respondent possesses the draft of $60 made payable to Viki Hollander representing the monies that were taken from Plaintiff-Petitioner by Defendants-Respondents. Accordingly, venue is proper

under 28 U.S.C. Section 1391(b)(2), since a substantial part of the property that is the subject of the action (i.e., the $60 draft) is situated within the jurisdictional area of the District Court for the Central District of Illinois.

Rendered Decision of the United States Court of Appeals for the Ninth Circuit that Overlooks a Clear Distinction which Supreme Court Cases have Drawn and in doing so Creates a Conflict among the Circuits on an Issue
and
Rendered Decision of the United States Court of Appeals for the Ninth Circuit that is in Conflict with the Decision of Another Court of Appeals on the Same Important Matter

Pre-Judgment Child Support Procedures

4. Whether Judge Gary L. Taylor in the Central District of California and the Ninth Circuit Court of Appeals erred in dismissing Plaintiff's constitutional due process claims under Section 1983 for lack of jurisdiction because it cannot be determined at the pleading stage that, as a matter of law under the Rooker-Feldman Doctrine, the district court had no jurisdiction, where, under the facts of the instant case, the judgment was a default judgment for which plaintiff had no notice or opportunity to be heard?

Discussion (Issue 4)

The *Rooker-Feldman Doctrine*

In Brokaw v. Mercer County, 235 F.3d 1000, 1019 (7th Cir. 2000), "[t]he *Rooker-Feldman* doctrine derives its name from two decisions of the Supreme Court, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 68 L. Ed. 362, 44 S. Ct. 149 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 75 L. Ed. 2d 206, 103 S. Ct. 1303 **(1983)**." *Remer*

v. Burlington Area Sch. Dist., 205 F.3d 990, 996 (**7th Cir.** 2000). Simply put, the *Rooker-Feldman* doctrine "precludes lower federal court jurisdiction over claims seeking review of state court judgments ...[because] no matter how erroneous or unconstitutional the state court judgment may be, the Supreme Court of the United States is the only federal court that could have jurisdiction to review a state court judgment." Id.

Generally speaking, if the complaint attacks the state court judgment, then *Rooker-Feldman* bars subject matter jurisdiction. *Nesses v. Shepard*, 68 F.3d 1003, 1004 (**7th Cir.** 1995). Also, while "in its most straight-forward presentment, the *Rooker-Feldman* doctrine bars federal jurisdiction when the federal plaintiff alleges that her injury was caused by a state court judgment," the exact parameters are less than clear because the doctrine "is not limited to just those claims alleging that the state court judgment itself caused the federal plaintiff's injury; the doctrine also precludes federal jurisdiction over claims inextricably intertwined with a state court determination." *Remer*, 205 F.3d at 996. Discerning "which claims are and which claims are not 'inextricably intertwined' with a state judgment" is a difficult process. *Id.* As courts have often explained, "the pivotal inquiry in applying the doctrine is whether the federal plaintiff seeks to set aside a state court judgment or whether he is, in fact, presenting an independent claim." *Id.*

Whether Plaintiff in the instant case is presenting an independent claim rather than a claim premised on an injury caused by the state court's judgment for delinquent child support is a complex question, as it is often "'difficult to distinguish' between situations in which the plaintiff is seeking to set aside a state court judgment and ones in which the claim is independent." *Edwards v. Illinois Bd. of Adm. to the Bar*, 261 F.3d 723, 728-29 (**7th Cir.** 2001) (quoting *Long*, 182 F.3d at 555). Here, Plaintiff contends that the defendants conspired--prior to any judicial involvement—(1) to register Plaintiff's 1986 Multnomah

County child support order without the permission of the obligor, Viki Hollander and (2) to cause Plaintiff's address not to be changed to his current address, resulting in Plaintiff not receiving due process notice of such judicial proceeding. Accordingly, Plaintiff is seeking damages for the conspiracy, not for the state court's decision in the child support proceeding. Under these circumstances, Plaintiff maintains that he has an independent claim which is not barred by *Rooker-Feldman*.

In support of his position, Plaintiff also cites *Nesses*, 68 F.3d 1003. In that case, Nesses brought suit in federal court against the lawyers and some of the judges involved in a breach of contract case which he had filed in Indiana state court and lost. *Id.* at 1004. Nesses claimed that his opponents' lawyers used their political clout to turn the state judges against him. *Id.* The district court dismissed Nesses' suit for lack of jurisdiction based on the *Rooker-Feldman* doctrine. *Id.* The Seventh Circuit rejected that conclusion, reasoning that the *Rooker-Feldman* doctrine did not bar Nesses' claim because his suit was not premised on a claim that the state court judgment denied him some constitutional right; rather, his federal claim was based on a right independent of the state court proceeding. As the court explained in *Nesses*, any other conclusion would mean that "there would be no federal remedy for a violation of federal rights whenever the violator so far succeeded in corrupting the state judicial process as to obtain a favorable judgment, ..." *Id.* at 1005. Moreover, the court reasoned that such a "result would be inconsistent with cases in which, for example, police officers are sued under 42 U.S.C. § 1983 for having fabricated evidence that resulted in the plaintiff's being convicted in a state court." *Id.*

The *Nesses* reasoning applies here. As in *Nesses*, Plaintiff is not merely claiming that the decision of the state court was incorrect or that the decision violated his constitutional rights; rather, he is alleging that the people involved in the decision to register his child support order

violated his constitutional rights, independent of the state court decision.

Post-Judgment, Pre-deprivation, Child Support Enforcement Procedures

5. Whether Judge Gary L. Taylor and the Ninth Circuit Court of Appeals erred in dismissing Plaintiff's constitutional procedural due process claims under Section 1983, where, under the facts of the instant case, a child support obligation was established by default judgment without notice or opportunity to be heard, because it cannot be determined at the pleading stage, as a matter of law, that the post-judgment, pre-deprivation procedures actually employed to enforce such child support obligation did, in fact, satisfy U.S. constitutional procedural due process requirements?

6. Whether adherence to the requirement of Cal Rev & Tax Code § 19271(a)(3) ["At least 20 days prior to the date that the Franchise Tax Board commences collection action under this article, the Franchise Tax Board shall mail notice of the amount due to the obligated parent at the last known address and advise the obligated parent that failure to pay will result in collection action. If the obligated parent disagrees with the amount due, the obligated parent shall be instructed to contact the local child support agency to resolve the disagreement."] is a procedural due process requirement in the instant case?

7. Does *Griffins* limit *Endicott*'s holding that notice and hearing on the underlying judgment serves as constructive notice of all that will follow?

Discussion (Issues 5-7)

Two Supreme Court decisions considering what pre-enforcement process is due when a creditor seeks to enforce a judgment. *In Endicott-Johnson Corp. v. Encyclopedia Press, Inc.*, 266 U.S. 285, 69 L. Ed. 288, 45 S. Ct. 61 (1924), the Court held that, having received full notice and hearing on the underlying judgment, the debtor was not entitled to further notice before execution of that judgment:

The established rules of our system of jurisprudence do not require that a defendant who has been granted an opportunity to be heard and has had his day in court, should, after a judgment has been rendered against him, have a further notice and hearing before supplemental proceedings are taken to reach his property in satisfaction of the judgment. Thus, in the absence of a statutory requirement, it is not essential that he be given notice before the issuance of an execution against his tangible property; after the rendition of the judgment he must take "notice of what will follow," no further notice being "necessary to advance justice." *Id.* 266 U.S. 285, 288 (citations omitted).

However, a later case, *Griffin v. Griffin*, 327 U.S. 220, 232, 90 L. Ed. 635, 66 S. Ct. 556 (1946), appears to narrow the holding in *Endicott*. In *Griffin*, a wife litigated and won an award of alimony, and ten years later, without notice to the husband, she obtained a judgment that alimony payments were in arrears and a writ authorizing execution of that judgment. The Court held that the failure to give notice of the later proceedings violated due process, and therefore, that the judgment could not be enforced:

While it is undoubtedly true that the 1926 decree, taken with the New York practice on the subject, gave petitioner notice at the time of its entry that further proceedings might be taken to docket in judgment form the obligation to pay installments accruing under the decree, we find in this no ground for saying that due process does not

require further notice of the time and place of such further proceedings, inasmuch as they undertook substantially to affect his rights in ways in which the 1926 decree did not.

The Court in *Griffin* did not make reference to Endicott, but many courts have interpreted *Griffin* as limiting Endicott's holding that notice and hearing on the underlying judgment serves as constructive notice of all that will follow. *See, e.g., McCahey v. L.P. Investors*, 774 F.2d 543, 548 (2d Cir. 1985); *Brown v. Liberty Loan Corp. of Duval*, 539 F.2d 1355, 1364-65 (5th Cir. 1976); *see also Hanner v. DeMarcus*, 390 U.S. 736, 741-42, 88 S. Ct. 1437, 20 L. Ed. 2d 270 (1968) (Douglas, J., dissenting from the dismissal of writ of certiorari on the question of overruling *Endicott*). These cases interpret *Griffin* as holding that, at least as to issues and rights that were not litigated in the underlying judgment, such as defenses to execution on particular assets, *Endicott* does not supply the answer. *McCahey*, 774 F.2d at 547-49; *Brown*, 539 F.2d at 1364-65; *see also Aacen v. San Juan County Sheriff's Dep't*, 944 F.2d 691, 695 (10th Cir. 1991); *Dionne v. Bouley*, 757 F.2d 1344, 1351-52 (1st Cir. 1985).

Griffin distinguished between judgments entered with adequate prior notice and hearing (as was the case in *Endicott*) and those entered without those prejudgment procedures (which could not be enforced). *Griffin*, 327 U.S. at 233-34. Viewed in light of *Griffin*, *Endicott* does not entirely foreclose consideration of whether the Due Process Clause requires post-judgment notice or other procedures. According to Plaintiff, because she received no notice of the County's registration of Plaintiff's child support order, he failed to appear, yet he retained his right to collaterally attack jurisdiction elsewhere. As to jurisdiction (without which the judgment is void), Plaintiff never had the "day in court," where the "day in court" was the basis of *Endicott's* holding that no further pre-deprivation notice was required.

In determining, then, what post-judgment process (if any) is due, we must balance the nature of the private

interests at stake, the risk of harm from erroneous deprivations, and the government's interests affected. *See Mathews v. Eldridge*, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976); Aacen, 944 F.2d at 695-96; *McCahey*, 774 F.2d at 548-49; *Finberg v. Sullivan*, 634 F.2d 50, 57-58 (3d Cir. 1980) (en banc); *see also Weller*, 901 F.2d at 394.

Interests that are procedurally protected by the Due Process Clause may arise from two sources -- the Due Process Clause itself and laws of the states. See Meachum v. Fano, 427 U.S. 215, 223-27, 49 L. Ed. 2d 451, 96 S. Ct. 2532 (1976). Once a protected interest is established, either through the Due Process Clause itself or through a state statute or regulation, the court must determine what process is due before the interest may be taken away. See Mathews v. Eldridge, 424 U.S. 319, 334-35, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976); Neal v. Shimoda, 131 F.3d 818, 830 (9th Cir. 1997). An essential principle of due process is that a deprivation of life, liberty or property "'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'" Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985). To determine what process is due, the court must balance the risk of an erroneous deprivation, the government's interest in providing specific procedures, and the strength of the individual's interest. See Erickson v. U.S., 67 F.3d 858, 863 (9th Cir. 1995); see also Mathews, 424 U.S. at 334-35 (employing balancing test to determine process due). This determination is a matter of federal law; it is not restricted by any specific procedures mandated by state statute or regulation. See Mathews, 424 U.S. at 334-35; Quick v. Jones, 754 F.2d 1521, 1523 (9th Cir. 1985).

Under the facts of the instant case, **Post-Judgment, Pre-deprivation Procedures** are found in of Cal Rev & Tax Code § 19271(a)(3), satisfying U.S. constitutional requirements, if followed. However, here, these procedural requirements were not followed. In fact, Plaintiff contends that Defendants conspired to violate such due process

procedures, where adherence to said requirements is a procedural due process requirement in the instant case.

Absolute Prosecutorial Immunity

8. Whether Judge Gary L. Taylor erred in holding that Stout is entitled to Absolute Prosecutorial Immunity because it cannot be determined at the pleading stage, as a matter of law, that Stout enjoys Absolute Prosecutorial Immunity from plaintiff's Section 1983 claims for money damages since, under the facts of the instant case, intentionally failing to (i) diligently determine Plaintiff's last known address and (2) attest to proper notice are non-advocatory, administrative functions?

Discussion (Issue 8)

In **Kalina v. Fletcher,**118 S. Ct. 502 (1997), the Supreme Court addressed whether the doctrine of absolute **prosecutorial immunity** protects a prosecutor from liability for attesting to false facts in an affidavit supporting the issuance of an arrest warrant. Id. at 505. A unanimous Court held that a prosecutor is not protected by absolute immunity for her action in executing the affidavit. Id. at 510. While absolute immunity protects a prosecutor for activities in initiating and prosecuting a case or by otherwise performing acts "intimately associated with the judicial phase of the criminal process," [Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976)] the Court concluded in Kalina that "testifying about facts is the function of the witness, not of the lawyer." Kalina, 118 S. Ct. at 510. The Court found that the prosecutor in Kalina functioned as a complaining witness. Id. Since a complaining witness was accorded only qualified immunity at common law [Id. at 508] and no policy concerns justified extending absolute immunity to a prosecutor for such an action [Id. at 510],

the Court declined to accord absolute immunity to the prosecutor in Kalina for attesting to facts. Id.

In Buckley v. Fitzsimmons, 509 U.S. 259 (1993), the Supreme Court further clarified the scope of absolute **prosecutorial immunity** by holding that absolute immunity should not be accorded to a prosecutor for false statements made to the media and for allegedly fabricating evidence during the preliminary investigation of a crime. Id. at 261. A unanimous Supreme Court held that the prosecutor's statements to the press were non-advocatory and, thus, not entitled to absolute immunity. Id. at 277. A five-to-four majority also held that the alleged fabrication of evidence was not advocatory and, thus, not deserving of absolute immunity. Id. at 272, 282. The Court stated that the ultimate question was whether the function in question was advocatory or non-advocatory. Id. at 272-73. A prosecutor cannot engage in advocatory acts, however, until probable cause is determined. id. at 274. The Court recognized that there is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is "neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other." Id. at 273 (quoting Hampton v. Chicago, 484 F.2d 602, 608 (7th Cir. 1973)).

In *Zahrey*, the Second Circuit took the position that a plaintiff does state a claim under § 1983 when he shows that prosecutorial misconduct in gathering evidence has led to a deprivation of his liberty. The intervention of a subsequent immunized act by the same officer does not break the chain of causation necessary for liability. *Zahrey* v. *Coffey*, 221 F.3d 342 (CA2 2000); see also *Clanton* v. *Cooper*, 129 F.3d 1147 (CA10 1997).

Under the facts of the instant case,

Accordingly, for the above reasons, this Court should VACATE the ORDER and JUDGMENT of Judge Gary L. Taylor and REMAND this case for further proceedings on this issue.

CONCLUSION/SUMMARY

Petitioner contends:

- Proper development of the law requires that the Supreme Court answer the Questions Presented.
- The Questions Presented:
    - address problems beyond the academic or the episodic and
    - Involve Principles, the settlement of which is important to the public as distinguished from the parties.
- There are subtle and important questions of practice dealing with the Federal Rules of Civil Procedure that is best for the Supreme Court to address. In the past, this Court has not hesitated to reverse a District Court where it concludes that an action of the District Court did not comply with a provision of the Federal Rules of Civil Procedure.
- In this case, an opportunity is afforded to resolve a conflict between the Circuits within 3 important areas: (1) on the reviewability of transfer orders, (2) on the procedural due process requirements within the context of post-judgment, pre-deprivations of property, and (3) on the applicability of Rooker-Feldman within the context of a default judgment in the absence of notice and opportunity to be heard. Within these contexts, efforts by various lower courts to effect a resolution have given rise to a variety of inconsistent opinions resulting from those courts' attempts to apply decisional authority of this Court, whose holdings themselves do not readily mesh to guide such resolution. Lower courts have seized upon this Court's rhetoric,

rather than its logic. For example, lower courts have raised generic terms like "transfer" to the status of a rule of law and have applied this rule to all types of transfers, totally disregarding legal effect. An approach to the resolution of claims of competing interests, which focuses on generic concepts, invites judicial discord, since the decisional variable lacks even intuitive appropriateness to the problems that they are supposed to resolve. A compelling need therefore exists both to reconstruct a principle or a series of principles to govern the reviewability of transfers and to discontinue reliance on generic terms like "transfer" that is inappropriate to a resolution of the situations to which courts have with increasing difficulty applied.

Accordingly, given:

- **that the Questions Presented are substantial and novel and had occasioned a split of authority among the lower federal courts,**
- **the need for uniform enforcement of the federal common law and the Federal Rules of Civil Procedure**

the petitioner respectfully prays that its petition for a Writ of Certiorari be granted.

Respectfully submitted,

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